SUPREME COURT

FOR THE

STATE OF CONNECTICUT

SC 19622

AMARAL BROTHERS, INC.
PLAINTIFF-APPELLANT

v.
STATE OF CONNECTICUT,
DEPARTMENT OF LABOR
DEFENDANT-APPELLEE

BRIEF OF THE PLAINTIFF-APPELLANT

ATTORNEYS FOR THE PLAINTIFF-APPELLANT
ROBIN B. KALLOR, ESQ.
MELINDA A. POWELL, ESQ.
ROSE KALLOR, LLP
750 MAIN STREET, SUITE 606
HARTFORD, CT 06103
RKALLOR@ROSEKALLOR.COM
MPOWELL@ROSEKALLOR.COM
TEL: 860-748-4660
FAX: 860-241-1547
JURIS NO.: 426943

TO BE ARGUED BY:
MELINDA A. POWELL, ESQ.

TABLE OF CONTENTS

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err when it upheld the Department of Labor's declaratory ruling, which imposed limitations on Plaintiff's use of a tip credit toward the minimum fair wage, but was not authorized by the plain language of the statute? **(pp. 5-13).**

2. Did the trial court err when it gave deference to the Department of Labor's "unwritten" policy finding the interpretation was time tested? **(pp. 13-15).**

3. Did the trial court err when it found the Department of Labor's interpretation was judicially approved, citing a superior court case involving an employer tip credit for bartenders? **(pp.15-18).**

4. Did the trial court err when it found legislative acquiescence to the DOL despite the 1980 amendment to statutory language which altered the DOL's authority from permissive recognition of a tip credit to mandatory recognition of a tip credit? **(pp. 20-23).**

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

REGULATIONS

RULES

STATEMENT OF FACTS

This case concerns the proper application of the "tip credit" provision of Conn. Gen. Stat. § 31-60(b)(1), as applied to the Plaintiff, Amaral Brothers, Inc. (hereinafter "Plaintiff" or "Amaral"). Amaral operates two Domino's® franchises here in Connecticut: one in Groton and one in Mystic, and employs approximately 40 delivery drivers. **(A5, A8-A9).** The Defendant is the State of Connecticut Department of Labor (hereinafter "Defendant or "DOL"), a state agency which regulates employers such as the Plaintiff.

On October 16, 2013, Plaintiff proactively sought to utilize the statutory "tip credit" toward meeting the state's minimum wage. Therefore, pursuant to Conn. Gen. Stat. §§ 4-174 and 4-176, Plaintiff filed a Petition for Declaratory Ruling and Petition for Regulations with the DOL. **(A25-A345).** The Petition set forth the salient facts regarding Plaintiff's business, operations and record keeping, and tips received from customers, as well as wages paid by Plaintiff.[1] **(A25-A345)**. The DOL and Plaintiff agree that Plaintiff's employees are "persons, other than bartenders, who are employed in the hotel and restaurant industry, …who customarily and regularly receive gratuities." Conn. Gen. Stat. § 31-60(b). **(A31, A349-A352).** These particular restaurant employees are generally classified by Plaintiff as either "insiders" or "delivery drivers." Plaintiff's delivery drivers almost exclusively deliver the food to the customer at the customer's home, whereas insiders generally prepare the food. **(A9-A10).** Insiders do not generally deliver the food. **(A9-A10).**

Plaintiff's Petition further explained the process by which employees, specifically delivery drivers, receive tips. **(A10).** Delivery drivers are tipped directly by the customer,

[1] All the facts set forth in the Petition were accepted by the DOL as true, and were thus undisputed below and in this appeal. **(A872).**

and received at the time of delivery of the food to the customer. **(A10).** Customers tip either in cash or by credit card. **(A10).** Delivery drivers report their cash tips to the Plaintiff through an electronic system. **(A10).** At the end of the night or shift, they confirm the amount of tips earned through a password protected system. **(A10).** When Plaintiff provides the employee's weekly paycheck, the tips are stated as a separate element of the employee's earnings. **(A10).** All reported tips are subject to federal and state tax withholdings.[2] **(A10).** Consequently, Plaintiff pays the employer portion of any requisite payroll taxes based upon all wages, including tips that are reported. **(A10).**

Plaintiff uses time tracking systems in its operations. **(A10).** These systems allow Plaintiff to separately track the amount of time that delivery drivers are on the road versus the amount of time delivery drivers are in the store. **(A10).** Thus, to the extent necessary, Plaintiff can segregate any time spent by delivery drivers working in the store in such diversified tasks such as food preparation and order taking, as differentiated from the food service to the customers. **(A10).** The DOL accepted Plaintiff's evidence on these issues as well. **(A352).**[3] Plaintiff supported its Petition with six months of payroll records, to factually establish that its employees "regularly and customarily received gratuities." **(A41-A331).** This evidence indisputably showed the tips received by the delivery drivers amounted to more than the 2013 minimum wage, at an average of about $10.00 per hour. **(A41-A331).**

---

[2] Tips are "wages" pursuant to the federal and state tax codes. See 26 U.S.C. §§ 3101, 3102, 3306, 3111, 3121 (FICA, which excludes tips in its calculations, except in excess of $20/month); see also Conn. Gen. Stat. § 31-222(e).

[3] As aptly noted by the court's decision below, not at issue herein are the wage rate or time spent by delivery drivers while working in the store. **(A873).** Plaintiff intends to pay the full minimum fair wage for time spent inside the store. **(A872-873).**

On December 16, 2013, the DOL published its notice of intent to issue a declaratory ruling. **(A344)**. On April 11, 2014, the DOL denied Plaintiff's Petition and request for relief. **(A361).** The DOL denied Plaintiff's Petition for the following stated reasons: (1) the regulations were valid because they served a remedial purpose, were time-tested and subject to judicial scrutiny in Back Bay Restaurant Group, Inc. v. State of Connecticut Department of Labor, 2001 Conn. Super LEXIS 2440 (Conn. Super. Ct. Aug. 14, 2001) **(A354-A357)(A874)**; and (2) the only act of "service" was handing the food to the customer at the customer's door **(A359)** and so delivery drivers' duties were not *solely* serving food as required under Regulations of Connecticut State Agencies § 31-62-E2(c). **(A359)**. The DOL's decision was that only employers of "service employees" as defined by the DOL could utilize the credit, and Plaintiff's employees were not service employees. The rationale offered was that these employees were required to do other functions while they were driving that did not relate "solely" to the service they were providing, in that they were required to: (a) possess a valid motor vehicle license; (b) ensure maintenance and readiness of a personal vehicle; (c) be attentive to motor vehicle laws; (d) obtain accurate directions to their destinations; and (e) actively communicate with the employer remotely **(A359).**[4] The only time the employees were acting as "service" employees was when they took the food from the car in the driveway to the front door. **(A359)**. Since the employees did not solely take the food from the driveway to the front door, the employer was disqualified from taking the credit. **(A359).** The DOL noted that, notwithstanding the "tables and booths" language of Regulations of Connecticut State Agencies § 31-62-E2(c), it was

[4] These "duties" were created by the DOL.

primarily concerned with the nature of the duties and not the location of where the food was served. **(A336).**

Plaintiff then timely appealed to the Superior Court, pursuant to Conn. Gen. Stat. § 4-183. **(A5-A14).** On July 8, 2015, the Honorable Carl J. Schuman dismissed Plaintiff's appeal and affirmed the DOL's application of Conn. Gen. Stat. § 31-60(b)(1) to the Plaintiff. (**A872-A886).** The trial court opined that the DOL was required to promulgate regulations guaranteeing that employers can recognize gratuities towards the minimum wage (and thus apply a tip credit) for all hotel and restaurant employees other than bartenders who "customarily and regularly receive gratuities; yet "the regulations … do not do that…" **(A879).** As found by the trial court, "[t]he department, at oral argument, acknowledged that its regulations limit the applicability of the tip credit or reduced minimum wage in a way not authorized by the plain language of the statute." **(A880).** But the court upheld the DOL's decision, agreeing that the regulations were "reasonable", "time tested", and had "received judicial scrutiny and legislative acquiescence". **(A880).** The court also determined that the "minimum wage law should receive a liberal construction." **(A880).**

Thereafter, the Plaintiff timely appealed the decision to the Connecticut Appellate Court, and this Court transferred this appeal to itself, pursuant to Conn. R. App. P. § 65-1. **(A888, A901).**

STANDARD OF REVIEW

This case is an appeal from the trial court's decision issued pursuant to the Connecticut Uniform Administrative Procedures Act, Conn. Gen. Stat. § 4-183. Section 4-183(j) of the General Statutes provides as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The

court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

> Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . [When the agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo."

Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission, 310 Conn. 276, 281-83 (2013) (internal citations and quotation marks omitted). This case presents solely a question of law, for which no deference is due.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND THE PLAIN LANGUAGE OF CONN. GEN. STAT. § 31-60(b) DID NOT AUTHORIZE THE DOL'S INTERPRETATION AS APPLIED TO PLAINTIFF, BUT DISMISSED THE APPEAL.

A. Agency Authority may not Exceed Governing Statutes.

The DOL is a statutorily created state agency. Conn. Gen. Stat. § 31-1, *et seq*. Consequently, it is a body of limited authority that can act only pursuant to specific statutory grants of power. See Ethics Comm'n v. Freedom of Info. Comm'n, 302 Conn. 1, 8 (2011). "It is well established that an administrative agency possesses no inherent power. Its authority is found in a legislative grant, beyond the terms and necessary implications of which it cannot lawfully function." Id. (internal quotation marks omitted); see also Kinney v. State, 213 Conn. 54, 60 n.10 ("administrative agencies . . . must act strictly within their statutory authority" [citation omitted); State v. White, 204 Conn. 410, 419 (1987) ("[A]gencies must . . . act according to . . . strict statutory authority."). "The power of an administrative agency to prescribe rules and regulations under a statute is not the power to make law, but only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute . . ." Salmon Brook Convalescent Home, Inc. v. Comm'n on Hospitals & Health Care, 177 Conn. 356, 363 (1979)(emphasis added). This limit is well-established. Page v. Welfare Comm'r, 170 Conn. 258, 262 (1976); Pereira v. State Bd. of Educ., 304 Conn. 1, 40-41 (2012).

The trial court erred when it applied a legal oxymoron to this case. On the one hand, the court made a specific finding that the DOL's regulations were not consistent with the plain statutory language. **(A880).** The trial court opined:

> The plaintiff's argument is that the definition of "service employee" improperly limits the tip credit that the legislature granted it. The statute uses the mandatory "shall" in stating that the "Labor Commissioner *shall* adopt such regulations . . . as may be appropriate to carry out the purposes of this part. Such regulations . . . *shall* recognize, as part of the minimum fair wage, gratuities in an amount . . . effective January 1, 2015, equal to thirty-six and eight-tenths per cent of the minimum fair wage per hour for persons, other than bartenders, who are employed in the hotel and restaurant industry, including a hotel restaurant, who customarily and

> regularly receive gratuities . . .” General Statutes §31-60(b). See *DeMayo v. Quinn*, 315 Conn. 37, 43, 105 A.3d 141 (2014) (“shall” is ordinarily mandatory). Thus, the effect of the statute is that the commissioner must promulgate regulations guaranteeing that employers can recognize gratuities—and thus apply a tip credit—for all hotel and restaurant employees other than bartenders who “customarily and regularly receive gratuities.”
>
> The regulations, however, do not do that. As construed by the commissioner, the regulations restrict the tip credit to “service employees” whose “duties relate solely to the serving of food and/or beverages to patrons seated at tables or booths, and to the performance of duties incidental to such service, and who customarily receives gratuities.” Regs., Conn. State Agencies § 31-62-E2(c). Thus, logically, a restaurant may not be able to apply a tip credit for its employees who customarily receive gratuities, and thus who fully satisfy the statutory requirement, because their duties do not satisfy the regulatory requirement that they “relate solely to the serving of food and/or beverages to patrons seated at tables or booths.” The plaintiff claims that the department has no authority to promulgate regulations that restrict its statutory rights in this regard. *See, e.g., Kinney v. State*, 213 Conn. 54, 60 n.10, 566 A.2d 670 (1989) (“administrative agencies . . . must act strictly within their statutory authority . . .”).
>
> The department, at oral argument, acknowledged that its regulations limit the applicability of the tip credit or reduced minimum wage in a way not authorized by the plain language of the statute.

(A879-880).

The logical (and only appropriate) conclusion to follow after such a finding would have been for the trial court to rule the noncompliant regulations or their interpretation invalid. Dep’t of Public Safety v. State Bd. of Labor Relations, 296 Conn. 594, 601 n.8 (2010), Longley v. State Emps. Retirement Comm’n, 284 Conn. 149, 163 (2007) and Starks v. Univ. of Conn., 270 Conn. 1, 30 (2004). Instead, the trial court upheld the DOL’s application of the law to the Plaintiff anyway, relying on several legal principles: (1) the principle of judicial deference to a time tested, reasonable agency interpretation; (2) legislative acquiescence; and (3) that the minimum wage law is entitled to liberal

construction. **(A880).** The trial court misapplied these principles to overcome an otherwise obvious and (as conceded by the DOL) contrary statutory restriction on DOL's authority.

As applied to the restaurant industry, Conn. Gen. Stat. § 31-60(b)-(b)(1)(2014) provides that the DOL's regulations:

> . . . ***shall*** recognize, as part of the minimum fair wage, gratuities in an amount …, and effective January 1, 2015, equal to thirty-six and eight-tenths percent of the minimum fair wage per hour for ***persons, other than bartenders, who are employed in the hotel and restaurant industry . . . who customarily and regularly receive gratuities.***[5]

Conn. Gen. Stat. § 31-60(b) (emphasis supplied). This section requiring a mandatory tip credit was passed in 1980. Pub. Acts. 1980, No. 80-64. Thus, the framework within which the DOL may regulate the restaurant industry has been squarely set by the legislature.

DOL exceeded its authority when it denied Plaintiff's Petition, and the trial court failed to rectify that legal error. Instead, the trial court should have followed precedent set by Dep't of Public Safety v. State Bd. of Labor Relations, 296 Conn. 594, 601 n. 8 (2010), Longley v. State Emps. Retirement Comm'n, 284 Conn. 149, 163 (2007) and Starks v. Univ. of Conn., 270 Conn. 1, 30 (2004). In all these cases, this Court invalidated inconsistent agency interpretations, without regard to the length of time that the agency had erroneously interpreted its charge. No deference is given to an agency's practice when such practice is in contravention of the language of a state statute. Id.

[5]At the time of Plaintiff's Petition, the minimum fair wage was $8.25. The minimum fair wage went up to $8.70 in January 1, 2014, $9.15 as of January 1, 2015 and $9.60 as of January 1, 2016. Conn. Gen. Stat. § 31-58 (2015). The reduced minimum wage in Connecticut is 36.8% of the statutory minimum, or $6.07/hour. Therefore, assuming that the average per hour tip remains constant at $10.00/hour, the average wage that a delivery driver will receive as of January 1, 2016, with an employer tip credit is $16.07. **(A41-A331).** It should also be noted that Plaintiff is not currently paying the reduced minimum wage, but is seeking to do so.

Similarly, in Starks, this Court reversed an agency interpretation of a statute that was time tested but inconsistent with the plain language of the statute. Starks, 270 Conn. at 30. In rejecting the agency's longstanding practice, this Court reasoned:

> Although the commission's current practice might be based on sound administrative reasoning, and a change in such practice inevitably might lead to thorny administrative concerns, we cannot condone the continued contravention of our legislature's directive that state disability retirement benefits be offset by certain types of workers' compensation benefits, such as those available pursuant to § 31-308a. 'There is a presumption that the legislature, in enacting a law, does so with regard to existing relevant statutes so as to make one consistent body of law.' State *v.* Murtha, 179 Conn. 463, 466, 427 A.2d 807 (1980). In addition, when statutes provide that an activity shall be performed in a certain manner, there ordinarily is an implied prohibition against performing that activity in a different fashion. State *v.* Kelly, 208 Conn. 365, 371, 545 A.2d 1048 (1988) ("[a] statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way" [internal quotation marks omitted]). In the present case, we conclude that the legislature explicitly has provided for an offset mechanism under [the statute] … and we cannot allow the past practice of an agency, no matter how well-meaning[6], to disregard the clear mandate of such provisions).

Starks, 270 Conn. at 30 (emphasis added).

Moreover, this Court in Longley rejected the State Employees Retirement Commission's interpretation since 1969 excluding longevity payments in pension calculations. 248 Conn. at 166, 175-176. In doing so, the Court concluded that the agency's interpretation was unauthorized by the statutory scheme. Id. at 175-178.

Yet again, in Dep't of Public Safety v. State Bd. of Labor Relations, 296 Conn. 594, 601 n.8 (2010), this Court declined to defer to agency interpretation of a statute that was not time tested and was inconsistent with the plain language of the statute.

The DOL's denial of the employer tip credit here should similarly fail.

---

[6] Likewise, the DOL may contend that its interpretation to curtail the tip credit to only certain employees in the restaurant business and not to others is "well-intentioned;" however, the intention is not consistent with the statutory scheme and, thus, cannot be upheld.

B. Conn. Gen. Stat. § 31-60(b)(1) Is Clear And Unambiguous In Mandating A Tip Credit.

Where the language of the statute is clear and unambiguous, courts cannot, by construction, read into the statute provisions which are not clearly stated. Harlow v. Planning & Zoning Comm'n, 194 Conn. 187, 193 (1984). In addition, courts and agencies must construe words used in statutes and regulations according to their commonly approved usage. Conn. Gen. Stat .§ 1-1(a)[7]; see also Carr v. Bridgewater, 224 Conn. 44, 56-57 (1992).

> The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of meaning is not considered.

Comm'n on Human Rights & Opportunities v. Windsor Hall Rest Home, 232 Conn. 181, 196 (1995); Schwartz v. Planning & Zoning Comm'n, 208 Conn. 146, 153 (1988).

The tip credit for the restaurant industry has been mandated by the legislature's use of the word "shall." Conn. Gen. Stat. § 31-60(b). As opposed to this provision, the legislature, in another part of this statute, has authorized the DOL a much broader role where it pertains to learners, apprentices and for this same section of the statute:

[7]Conn. Gen. Stat. Sec. 1-1(a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

> The commissioner may provide, in such regulations, modifications of the minimum fair wage herein established for learners and apprentices; persons under the age of eighteen years; and for such special cases or classes of cases as the commissioner finds appropriate to prevent curtailment of employment opportunities, avoid undue hardship and safeguard the minimum fair wage herein established....

Conn. Gen. Stat. § 31-60(b) (emphasis supplied).

> The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words.

Williams v. Comm'n on Human Rights & Opportunities, 257 Conn. 258, 268 (2001) (quoting Doe v. Statewide Grievance Committee, 240 Conn. 671, 680-81 (1997)).

For the tip credit to apply only to employees who "solely" serve food and beverage to customers at tables or booths creates a distinction that the statute does not create. There is no distinction between the mode of travel to the customer in Conn. Gen. Stat. § 31-60(b), yet the DOL has created such distinction. Both traditional waitstaff and Plaintiff's employees are performing the same service – delivering the food to the customer and both classes of employees receive tips for performing that service.[8]

In Roto Rooter, this Court reversed the DOL's interpretation of the commission exemption after an adverse ruling by the Superior Court. Roto-Rooter Services Co. v. Department of Labor, 219 Conn. 520, 525-528 (1991). In Roto-Rooter, even though the legislature failed to impose a duty-specific limitation on the scope of Conn. Gen. Stat. § 31-76i(g)(2), the DOL interpreted the commission exemption to apply only to commissions

[8] Obviously, Plaintiff does not concede that only waitstaff are covered or that it has to prove that its employees are equivalent.

earned by employees who only sold services rather than performing them.[9] In reversing the DOL's interpretation, this Court noted, "[i]f the legislature had intended to confine the application of § 31-76i to employees whose duties are restricted to selling, it certainly was aware of the explicit language with it could do so." Id. at 527.[10]

Likewise here, the DOL seeks to expand control over areas exempted by the legislature—namely a category of restaurant occupations that customarily receive gratuities. The legislature spoke with broad language regarding the occupations that will entitle an employer to a tip credit-that is, anyone employed in the restaurant industry who customarily and regularly receives tips. Nowhere did the legislature delegate the authority to the DOL to limit what it expressly granted.

C. A Statute's General Remedial Purpose is an Insufficient Basis to Rewrite the Statutory Language through Administrative Interpretation.

Finally, no deference is due to further a policy not apparent from the statutory language. The trial court upheld the DOL's interpretation on the basis that the overall purpose of the minimum wage laws is remedial, and therefore should receive a liberal construction. **(A881-882**, citing Shell Oil Co. v. Ricciuti, 147 Conn. 227, 282-83 (1960). (A881)). The trial court's analysis effectively ignored the "shall" limiting language in § 31-60(b) and that Shell is a 56 year old case, predating the legislature's 2003 adoption of the

[9] The Connecticut statutory language in Conn. Gen. Stat. § 31-60(b) tracks the federal Fair Labor Standards Act which also provides an employer tip credit for employees who regularly and customarily receive tips. See 29 U.S.C. § 203(t) ("Tipped employee" means any employee in an occupation in which he customarily and regularly receives more than $30 a month in tips.).

[10] The Appellate Court also reined in another agency in Albini v. Conn. Med. Examining Bd., 144 Conn. App. 337 (2013). In Albini, the agency attempted to exercise authority over occupations not delegated to it by the legislature. The statutory language prescribed the practice of medicine to include treatment of disease or abnormal health, but the Board interpreted the statute as allowing regulation over "conditions," a term broader than the language in the statute. Id. at 351.

plain meaning rule in Conn. Gen. Stat. § 1-2z. The Plaintiff requests that this Court not ignore, change or usurp the clear unambiguous legislative mandate/limitation on the DOL to recognize gratuities as part of the minimum fair wage by considering "extratextual" evidence, or the global purpose of the minimum wage law.

The tip credit recognizes competing goals: the entitlement to a certain benefit to the employer, but ensuring the employee earns at least minimum wage. This very specific and clear mandate to the DOL articulates a clear purpose to provide restaurant employers a slight reduction in the minimum wage it must pay to those employees who "regularly and customarily receive gratuities."[11] Where a clear legislative limitation to the agency exists, it cannot make a determination that ignores that limitation to suit a purpose that it likes better. As with any statute, "[c]ourts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." Mayfield v. Goshen Volunteer Fire Co., 301 Conn. 739, 758 (2011) (internal quotation marks and citations omitted).

II. THE COURT ERRED WHEN IT FOUND THE DOL'S INTERPRETATION WAS TIME TESTED AND JUDICIALLY APPROVED.

[11] Applying Plaintiff's factual situation is consistent with these goals. A comparison of the regularity in which the legislature, since 2002 has increased the statutory minimum wage and increased the tip credit supports Plaintiff's argument. The evidence put forth before the DOL was that the Plaintiff's employees, even accounting for an employer tip credit, would still receive $6.46 more than the statutory minimum fair wages. Here, Plaintiff's employees earn more than even the statutory minimum bartenders receive. Plaintiff's employees also earn more than the minimum fair wage that applies to most other industries. Plaintiff's legal position does not subvert the goal of a minimum fair wage. Instead, the wage statute has continuously recognized a long history and custom of tipping in American culture, which tipped employees earn in addition to employer paid wages.

Before a court finds that agency action is entitled to deference because of a time tested and judicially approved interpretation, it must review prior interpretations of the relevant issue and facts. Albini v. Conn. Med. Examining Bd., 144 Conn. App. 337, 348 (2013) (citing Pasquariello v. Stop & Shop Cos., 281 Conn. 656, 663 (2007)). A time-tested interpretation must have been formally applied over a long period of time. Likewise, judicial approval cannot be found if the same issue has not been reviewed. Id. These principles were misapplied by the trial court.

A. The Trial Court Erred When It Found an Unwritten Policy Was Time Tested.

The trial court incorrectly held the issue regarding Plaintiff's right to a tip credit had been time tested and subject to judicial scrutiny. The trial court applied the principle of time tested agency interpretation because it found the DOL's regulations were promulgated in 1958, it was unclear how long the agency was applying its "unwritten" practice to its regulations to exclude delivery drivers and Back Bay Rest. Group v. State Dep't of Labor, 2001 Conn. Super LEXIS 2440 (Conn. Super. Ct. Aug. 14, 2001)(*Cohn, J.*), justified at least "some" judicial scrutiny to the DOL, and had upheld the regulations. **(A880,886, n.13).** The DOL's interpretation was obviously unwritten because no prior formal decisions concerning similar facts were submitted by the DOL. **(A746-A843).** Yet, the trial court deferred to the agency anyway. This Court has not approved of an agency's informal, let alone unwritten policy to establish a rule which is entitled to deference. This Court rejected an agency's request for interpretive discretion for such policy preferences in Hasselt v. Lufthansa German Airlines, 262 Conn. 416, 432 (2003):

> We previously have not determined whether a commissioner's policy directive, which contains an interpretation not adopted pursuant to formal rule-making or adjudicatory procedures, is entitled to deference. Cf.

> *Christensen* v. *Harris County*, 529 U.S. 576, 586, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (federal Department of Labor's interpretation contained in opinion letter rejected because it is "not one arrived at after, for example, a formal adjudication or notice- and-comment rulemaking. Interpretations such as those in opinion letters--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant . . . deference" as prescribed under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 [1984].). Nonetheless, in light of our failure to accord such deference to an agency's interpretation of a statute that has been neither time-tested nor subject to judicial review; *S. New Eng. Tel. Co.* v. *Dep't of Pub. Util. Control*, 261 Conn. 1, 13, 803 A.2d 879 (2002); *Schiano* v. *Bliss Exterminating Co.*, [] 260 Conn. at 34; we cannot conceive of a rationale for according substantial deference to the Frankl memorandum under these circumstances.

Id. Cf. Tuxis Ohr's Fuel, Inc. v. Adm'r, Unemployment Comp. Act, 309 Conn. 412 (2013).

Therefore, the trial court's decision was in error.

B. The Trial Court Erred When it Found Judicial Approval Based on a Superior Court Decision Involving Bartenders.

The trial court also applied a deferential review relying on a 1999 superior court decision titled Back Bay Rest. Group v. State Dep't of Labor, 2001 Conn. Super LEXIS 2440 (Conn. Super. Ct. Aug. 14, 2001)(*Cohn, J.*)**(A960)**, which in the trial court's view was sufficient as "some" judicial scrutiny of the DOL. **(A880, 886, n.13)**. However, the Back Bay decision failed to give legal effect to the legislative change in 1980, which took away the DOL's permissive authority over tip credits and, instead, mandated the tip credit. Also, Back Bay interpreted the statute as applied to bartenders. 2001 Conn. Super. LEXIS at *2-9. These points are discussed in turn.

A close examination of Back Bay is required because the essentially advisory decision rested on an inaccurate legal premise and a factually distinguishable class of restaurant employees—bartenders. As of the passage of these regulations in 1958, the legislature had not begun requiring the DOL to recognize a tip credit. P.A. 435 § 5, eff. July

1, 1957 **(A1006)**. Rather, the legislature left the decision up to the DOL to determine to whom the tip credit would apply, stating:

> Such regulations may include, but are not limited to, regulations defining and governing outside salesman, learners and apprentices, their number, proposition and length of service…and may recognize as part of the minimum fair wage, bonuses, gratuities, special pay…and allowances for the reasonable value of board…."

Id. (emphasis supplied). Thus, at that time, the legislature gave no particular guidance about to whom or when tip credits should be recognized.

In 1973, the legislature revisited Conn. Gen. Stat. § 31-60 and both repealed and substituted it.[12] While the legislature at that time still maintained the DOL's discretion, the legislature began to specifically mention that the DOL may recognize a tip credit in the "hotel and restaurant" industry. P.A. 73-561, eff. June 17, 1973 ("Such regulations … may recognize gratuities not to exceed 60 cents per hour for persons employed in hotel and restaurant industry.") **(A1003).** The DOL's authority changed in 1980, though.

In 1980, the mandatory tip credit and its rate were instituted by the legislature to allow employers the credit for all hotel and restaurant employees, at twenty-three percent (23%) of the minimum fair wage. P.A. 80-64, eff. January 1, 1981. The statutory language was changed to: "[s]uch regulations … shall recognize, as part of the minimum fair wage, gratuities in an amount equal to twenty-three percent of the minimum fair wage per hour for persons employed in the hotel and restaurant industry…." P.A. 80-64, eff. January 1, 1981.

[12] There were no legislative amendments after the 1957 amendment and the passage of the 1973 amendments. P.A. 435 § 5, eff. July 1, 1957 **(A1004-1006)**; P.A. 73-561, eff. July 1, 1973 **(A1003)**.

(emphasis added). **(A1000).**[13] The legislature changed the law in May 2000 effective January 2001, however. Two separate minimum rates were statutorily established for January 2001: one ($4.74 per hour) for hotel and restaurant employees who regularly and customarily receive tips and another ($6.15 per hour) for bartenders who regularly and customarily receive tips.[14] In May 2001, the legislature changed the law back to a percentage basis, and the percentage basis has continued to this date.[15] P.A. 01-42, eff. May 31, 2001. **(A994-995)**

The DOL has not ever amended its regulations to comport with the mandatory language recognizing a legislatively granted tip credit beginning in 1980, or reauthorization of the mandatory tip credit in subsequent years since 1999. Likewise, the DOL has not amended its regulations to comport with amendments for hotel and restaurant employees who regularly and customarily receive tips, in effect since 2000. The Back Bay court did not review these reiterations of legislative intent that employers shall receive a credit. Back Bay Rest. Group v. State Dep't of Labor, 2001 Conn. Super LEXIS 2440 (Conn. Super. Ct. Aug. 14, 2001).

Most importantly, if Conn. Gen. Stat. § 1-2z had been in effect in 1999, the court would not have needed to comb legislative history and floor debates or comments to

---

[13] Thereafter, the legislature maintained the mandatory credit as a percentage of the minimum fair wage in in 1999 and through 2000 for employees in hotels and restaurants. PA. 99-199, eff. June 23, 1999 **(A998-999)**; P.A. 00-144, eff. May 26, 2000 **(A996-997).**

[14] This is the first addition by the legislature qualifying a restaurant employer tip credit to employees who regularly and customarily receive tips. P.A. 00-144, eff. May 26, 2000 **(A996-997).**

[15] In May 2001, the tip credit rate was 26% and increased to 29.3% in 2002. P.A. 01-42, eff. May 31, 2001. **(A994-995).** The next legislative action was in 2009 when it was raised to 31%. P.A. 08-113, eff. June 23, 2008 **(A990)**, to 34.6% effective January 1, 2014, and equal to 36.8%, effective January 1, 2015. P.A. 13-117, eff. July 1, 2013 **(A988-989).**

discern intent. The statute itself would have been, and is sufficient. The Back Bay court did not perform any analysis of the plain language of the statute, as is required. Therefore, Back Bay does not save the DOL's narrowing or exclusion of Plaintiff's statutory benefit.

Likewise, the DOL has not cited, nor has the Plaintiff or the trial court been able to find any reported or unreported cases that have discussed the DOL's authority over the delivery driver issue. **(A704-749; 872-886).** As the trial court acknowledged, it was "unclear how long the DOL has interpreted its regulations" in this manner and it "enforced an unwritten practice" to prohibit employers from taking a tip credit for food delivery drivers. **(A883, 886, n.13).** This finding is a telling harbinger of legal error: It was impossible for the trial court to determine a date for the "practice" because the DOL failed to show a prior pronouncement or pattern of any practice. Therefore there can be no time tested interpretation and *ipso facto*, no judicial approval of the non-existent practice.

C. The Trial Court Erred In Finding a Time Tested Interpretation When DOL Abandoned Prior Reasoning To Deny Plaintiff's Petition, But Still Deferred To The Agency.

The record established that the DOL abandoned its own regulatory language which only allowed a full tip credit to employers of "service employees" who serve food at "tables and booths." See Regs., Conn. State. Agencies § 31-62-E2(c). The plain language of the regulations do impart a significance to where the service is performed, ie. at tables or booths.[16] The DOL apparently maintained this distinction as determinative up until Plaintiff's Petition. The DOL had insisted that an employee serve food at tables or booths to fall within the statutory allowance of an employer tip credit. In State Labor Dep't. v.

[16] When the trial court posed a hypothetical question about drive up restaurants where one eats in their car like the old A&W restaurant, DOL's counsel acknowledged no tip credit would be allowed because the service was not at a table or booth. **(A931-932).**

America's Cup, integral to the DOL's enforcement was the tables or booths distinction, since all the bartender "duties" were defined by their location, and there had been no segregation between service at the bar and service at a table. 1994 Conn. Super. LEXIS 985, at *4. Then, when Back Bay argued that tables or booths distinction was irrational, the DOL issued a Ruling that repeatedly relied on the tables or booths requirement in the regulation, but concluded that it was really making a distinction based on "duties." *See BackBay Declaratory Ruling*, at 10, 12-13 (In total, between the background and discussion section, the phrase "tables and booths" or "tables or booths" is mentioned 15 times). **(A855-866).**

No deference is due because, even though the statute requires the DOL to recognize an employer tip credit for bartenders, the regulations do not allow an employer to do so. Conn. Gen. Stat. § 31-60(b). Thus, this is not a situation where the DOL is simply filling in details within a generalized framework established by the legislature. The DOL's regulations disallow what the legislature has granted. Conn. Gen. Stat. § 31-60(b); Regs., Conn. State Agencies § 31-62-E2(c); **(A873-875).**

The DOL's suggested lessening of its requirement that food be served at tables or booths (despite the language in the regulation itself) in order for the tip credit to apply renders the DOL's analysis herein even more flawed and unreasonable. The DOL has apparently created or subtracted requirements as it sees fit to ensure employers cannot take a tip credit. Plaintiff's delivery drivers regularly earn more than minimum wage while serving the food to the customer's home, and certainly meet the definition of "regularly and customarily receive gratuities" as required by the regulations. But apparently the DOL is now concerned that Plaintiff's employees lack rapport with their customers and that there is

a lost opportunity for tips. **(A358-360).** Thus, the DOL completely ignored the fact that the employee takes the food from the kitchen to the customer, just like waitstaff do. Instead, the DOL equates the car in a customer's driveway with the kitchen to further contort its logic to fit a circumstance.

III. THE TRIAL COURT ERRED WHEN IT FOUND LEGISLATIVE ACQUIESCENCE BECAUSE THE ISSUE HAD NOT BEEN PREVIOUSLY ADJUDICATED AND LEGISLATIVE AMENDMENTS HAVE CONTINUED TO RECOGNIZE THE POLICY OF MAINTAINING THE EMPLOYER TIP CREDIT.

A. The issue had not been previously adjudicated.

For the reasons stated in Point II, *supra,* and as fully incorporated herein, Back Bay did not previously adjudicate the issue. The trial court's finding that there has been any sort of long standing practice should be reversed, and the DOL is not entitled to deference by this Court. Back Bay could not have validated the regulations where the legislature had already amended the statute to include a separate tip credit rate for bartenders and subsequently removed the sunset provision. See Pasquariello v. Stop & Shop Cos., 281 Conn. 656, 663 (2007).

B. Legislative amendments have continued to recognize the policy of maintaining a tip credit in the "restaurant industry."

Interestingly, shortly after the court decided Back Bay, in 2002, Conn. Gen. Stat. § 31-60(b) was amended again to include "customarily and regularly receive gratuities" as a modifier of "for persons employed in the hotel and restaurant industry, including a hotel restaurant." Prior to this amendment, "customarily and regularly receive gratuities" only modified "bartenders." The applicable language added is denoted below:

> (b) The Labor Commissioner shall adopt such regulations, in accordance with the provisions of chapter 54, as may be appropriate to carry out the purposes of this part…. Such regulations may include, but are not limited to, regulations defining and governing an executive,

> administrative or professional employee; and shall recognize, as part of the minimum fair wage, gratuities in an amount equal to twenty-three per cent of the minimum fair wage per hour for persons employed in the hotel and restaurant industry, including a hotel restaurant, and not to exceed thirty-five cents per hour in any other industry, and shall also recognize deductions and allowances for the value of board, in the amount of eighty-five cents for a full meal and forty-five cents for a light meal, lodging, apparel or other items or services supplied by the employer; and other special conditions or circumstances which may be usual in a particular employer-employee relationship. Notwithstanding the provisions of this subsection, for the period commencing January 1, 2002, and ending December 31, 2004, such regulations shall recognize, as part of the minimum fair wage, gratuities in an amount equal to (1) twenty-nine and three-tenths per cent of the minimum fair wage per hour for persons employed in the hotel and restaurant industry, including a hotel restaurant, WHO CUSTOMARILY AND REGULARLY RECEIVE GRATUITIES, (2) eight and two-tenths per cent of the minimum fair wage per hour for persons employed as bartenders who customarily and regularly receive gratuities. The commissioner may provide, in such regulations, modifications of the minimum fair wage herein established for learners and apprentices; persons under the age of eighteen years; and for such special cases or classes of cases as the commissioner finds appropriate to prevent curtailment of employment opportunities, avoid undue hardship and safeguard the minimum fair wage herein established.

Conn. Gen. Stat. § 31-60(b), P.A. 02-33, eff. May 6, 2002 **(A992-993)** (emphasis supplied). Subsequent amendments increased the minimum wage and increased the percentage for the tip credit. P.A. 08-113, eff. June 23, 2008 **(A990)**; P.A. 13-117,eff. July 1, 2013 **(A988-989)**. The legislature modified the language slightly, but continuously contained a separate tip credit for bartenders. P.A. 08-113, eff. June 23, 2008 **(A990);** P.A. 13-117, eff. July 1, 2013 **(A988-989).**

The legislative addition of the term “customarily and regularly receive gratuities” as a modifier to “hotel and restaurant employees” and the timing of that insertion shows that the legislature’s intent was to ensure the tip credit, rather than adopt some allegedly long standing DOL policy about limiting the credit to waitstaff in a sit-down restaurant.

C. The trial court erred when it found this Court's case of *Tuxis Ohr's Fuel* required a finding of legislative acquiesce.

Additionally, the only case cited by the trial court in its agreement with the DOL of legislative acquiescence, Tuxis Ohr's Fuel, Inc. v. Adm'r, Unemployment Comp. Act, 309 Conn. 412 (2013), is inapposite. **(A884).** Tuxis did not actually make a finding on legislative acquiescence, but provided more of a time tested analysis. Id. at 425-26. Moreover, this Court in Tuxis held that the statute in issue was susceptible to more than one reasonable construction. Accordingly, the Court concluded that the statute was ambiguous and, thus, resorting to "extratextual" interpretive aids was warranted in accordance with Conn. Gen. Stat. § 1-2z. Id. at 425-426. When it reviewed the legislative purpose and legislative history it determined that the DOL's interpretation was the more reasonable interpretation. It then considered the fact that the applicable statute had been the law for nearly two decades, and that this Court "reviewed the board's database of published decisions to discern whether there exists a long-standing administrative construction of the provision." Id. at 426-48. That index revealed the majority of the 128 cases that involve the application of the applicable statute justified the DOL's history of interpretation. Id. at 428. Accordingly, it upheld the DOL's interpretation. Id. at 425-26. None of these circumstances are present on this record, as shown by the mandatory unambiguous directive since 1980, addition of "regularly and customarily" as a modifier to the statute and the lack of any written policy and decisions.

Here, the trial court's decision stated it was "unclear how long the DOL has interpreted its regulations" in this manner and it "enforced an unwritten practice" to prohibit employers from taking a tip credit for food delivery drivers. **(A883, 886).** Thus, since there is a lack of time tested interpretation, no inference of legislative acquiescence may arise

either. Hartford v. Hartford Municipal Employees Association, 259 Conn. 251, 262 n.14 (2002) (inference of acquiescence more appropriate when there is a formal declaration of policy).

The trial court also cited Patel v. Flexo Converters U.S.A, Inc., 309 Conn. 52, 59, 62 n.9 (2013). Patel involved an issue of *stare decisis*. The plaintiff requested reversal of this Court's 1979 decision in Jett v. Dunlap, 179 Conn. 215 (1979), which interpreted the intentional tort exclusivity provision of the workers' compensation statute. Id. The Court found no reason to depart from *stare decisis* without an indication from the legislature to do so. 309 Conn. at 61-62, 62 n.9. *Stare decisis* is not implicated here. Rather, the trial court upheld an "unwritten practice" and cited a superior court case about bartenders, reliance which is misplaced as set forth, *supra*.

CONCLUSION

The issue presented here is whether the DOL may interpret Conn. Gen. Stat. § 31-60(b) in a manner contrary to the plain language of the statute, simply because the DOL promulgated regulations when it had more statutory discretion. This Court has not deferred to agency decisions which conflict with their legislative delegation, regardless of the amount of time such error has gone unchallenged. Dep't of Public Safety v. State Bd. of Labor Relations, 296 Conn. 594, 601 n. 8 (2010), Longley v. State Emps. Retirement Comm'n, 284 Conn. 149, 163 (2007) and Starks v. Univ. of Conn., 270 Conn. 1, 30 (2004). No prior DOL decision or court opinion has applied Conn. Gen. Stat. § 31-60(b) to the undisputed facts presented in this appeal. The DOL should not be granted additional authority to eliminate Plaintiff's employer tip credit when Plaintiff has shown its delivery drivers regularly and customarily receive tips well in excess of the statutory minimum fair wage.

Therefore, the Plaintiff respectfully requests that this Court reverse the trial court decision and sustain Plaintiff's appeal to utilize the statutory tip credit for its delivery drivers for the time spent out on deliveries.

PLAINTIFF-APPELLANT,
AMARAL BROTHERS, INC.

By__*/s/ Robin B. Kallor*_____

Robin B. Kallor
Melinda A. Powell
Rose Kallor, LLP
750 Main Street, Suite 606
Hartford, CT 06103
Juris No.: 426943
860-748-4660
860-241-1547 (fax)
Email: mpowell@rosekallor.com
rkallor@rosekallor.com

CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on January 25, 2016:

(1) The electronically submitted brief and appendix was delivered electronically to the last known e-mail address of each counsel of record or self-represented party for whom an e-mail address was provided:

Thomas P. Clifford, III, Esq.
Krista D. O'Brien, Esq.
State of Connecticut
Office of the Attorney General
Workers Comp/Labor
P.O. Box 120
Hartford, CT 06141

(2) The electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; and

(3) A copy of the brief and appendix was sent to each counsel of record or self-represented party and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with § 62-7:

The Honorable Carl J. Schuman
State of Connecticut Superior Court, Judicial District of New Britain
20 Franklin Square
New Britain, CT 06051

Thomas P. Clifford, III, Esq.
Krista D. O'Brien, Esq.
State of Connecticut
Office of the Attorney General
Workers Comp/Labor
P.O. Box 120
Hartford, CT 06141

(4) The brief and appendix filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) The brief complies with all provisions of this rule.

/s/ *Robin B. Kallor*
Robin B. Kallor